

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NEW COLT HOLDING CORP., <i>et al.</i> ,	:	
Plaintiffs,	:	
	:	
-vs-	:	Civ. No. 3:02cv173 (PCD)
	:	
RJG HOLDINGS OF FLORIDA, INC., <i>et al.</i> :	:	
Defendants.	:	

**RULINGS ON MOTION TO REDESIGNATE PURPORTEDLY CONFIDENTIAL
DOCUMENTS AND MOTION TO STRIKE DEFENDANTS' PROPOSED EXPERTS**

Defendant AWA International, Inc. ("AWA") moves to redesignate documents presently filed under seal as non-confidential and plaintiffs move to strike defendants' proposed expert witnesses. For the reasons set forth herein, AWA's motion is granted and plaintiffs' motion is denied.

I. MOTION TO REDESIGNATE DOCUMENTS

Plaintiffs filed their Responses to Defendant's Third Set of Interrogatories ("Responses") and designated the responses confidential.¹ AWA now challenges the designation, arguing that responses contained therein do not justify a confidential designation.

In response to AWA's challenge, plaintiffs respond that the Responses, which ask plaintiffs to state whether identified revolvers by various "manufacturers, sellers, and models . . . infringe[] Colt's trade dress," are "highly sensitive commercial material" because "[t]hey contain, in narrative form,

¹ On September 17, 2002, this Court issued a protective order (Doc. No. 41) "pertaining to confidential, commercial, financial or technical information, trade secrets, and/or proprietary information concerning the parties to this action." Under paragraph 2 of the order, the parties could designate documents or things produced "confidential" or "highly confidential," and by such designation hold any information gathered in "strict confidence" and subject to the protective order.

Colt's best opinion as to whether each of the 54 firearms infringes upon its intellectual property rights. Individual features of the weapons are evaluated and discussed."

It is not apparent how plaintiffs' opinion as to whether certain revolvers do or do not infringe on Colt's trade dress constitutes sensitive commercial information. This conclusion is unaffected by plaintiffs' unsupported claim that "public dissemination of this material has the potential to place plaintiffs at a competitive disadvantage." The responses are side-by-side comparison of plaintiffs' revolver and various purportedly infringing revolvers accompanied by a conclusion as to whether in plaintiffs' opinion such revolvers infringe on plaintiffs' trade dress. The responses include general commentary on revolver appearance noting similarities and differences through references to color (e.g., blue), placement of revolver components (e.g., ejection ports), presence and placement of patent marks and quality of components (e.g., bulkier or heavier). It strains credulity to argue that such general commentary, even if made by a party, constitutes highly sensitive commercial material or somehow surrenders a commercial advantage over competitors. Absent any argument whatsoever as to how this information justifies a being placed under seal, the confidential designation is inappropriate. AWA's motion is granted. The seal is hereby lifted on Doc. No. 132.

III. MOTION TO STRIKE DEFENDANTS' PROPOSED EXPERTS

Plaintiffs move to strike the names of six of defendants' proposed experts for failure to satisfy the requirements of FED. R. EVID. 702 and 703 and for violation of FED. R. CIV. P. 26(a)(2)(B).

Plaintiffs respond that defendants lack standing to make this challenge having not deposed the experts,²

² The 1993 Advisory Committee notes to Rule 26(a)(2)(B) provide that "[s]ince depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition." As the reports may obviate the need to depose the expert, defendants' standing argument, *i.e.*, that plaintiffs may not move to exclude unless proposed

that the retail experts are competent to testify under Rule 702, that the testimony is not offered as a replacement for a consumer survey, that the testimony is based on first-hand experience rather than hearsay, that disclosure obligations have been satisfied and that the testimony is reliable.

Defendants' proposed experts include Michael Harvey from Cimarron Firearms, Boyd Davis from firearm manufacturer EMF Company, Inc., and gun retailers Dave LaRue, Mike Caruso, James Glidden and John Harrell. Their expert testimony is sought on the issue of customer confusion and in support of defendants' claim that plaintiffs' trade dress is generic.

Admissibility of expert testimony is governed by the Federal Rules of Evidence. Rule 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "For an expert's testimony to be admissible under this Rule, however, it must be directed to matters within the witness' scientific, technical, or specialized knowledge and not to lay matters which a jury is capable of understanding and deciding without the expert's help." *Andrews v. Metro N. Commuter R.R.*, 882 F.2d 705, 706 (2d Cir. 1989).

It is not apparent how the proposed expert testimony involves subject matter that could not be understood by a lay juror. *See United States v. Gonzalez-Maldonado*, 115 F.3d 9, 18 (1st Cir. 1997) ("Expert testimony on a subject that is well within the bounds of a jury's ordinary experience generally has little probative value. On the other hand, the risk of unfair prejudice is real. By appearing to put the expert's stamp of approval on . . . [a] theory, such testimony might unduly influence the jury's

experts are first deposed, is without merit. *See SEC v. Lipson*, 46 F. Supp. 2d 758, 763 n.3 (N.D. Ill. 1998).

own assessment of the inference that is being urged.”) This Court takes no position at present on the experts credentials or the proposition that they are themselves familiar with the revolver industry. What does give this Court pause is the purpose of the proposed expert testimony, specifically to “establish the nature of the markets and consumers for single action revolvers (both Colt’s Model P and replicas), the behavior and knowledge of consumers in those markets, the conduct of such consumers during such purchases, the lack of any confusion in the actual market, and the fact that no one would substitute the Defendants’ products for the Colt’s Single Action Army (‘SAA’) revolver.”

The stated purposes described above could be accomplished through testimony by fact witnesses and does not appear to involve the sort of “specialized knowledge” that would be incomprehensible absent expert opinions. If opinion testimony is required, it is not apparent why such testimony could not be offered through lay opinion. *See United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (“[L]ay witness testimony is governed by Rule 701, which limits opinions to those ‘rationally based on the perception of the witness.’ Rule 702, on the other hand, governs admission of expert opinion testimony concerning ‘specialized knowledge.’”); *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 203 (4th Cir. 2000) (noting that “critical distinction between Rule 701 and Rule 702 testimony is that an expert witness must possess some specialized knowledge or skill or education that is not in the possession of the jurors” (internal quotation marks omitted)). Testimony from experts may be used to assist the trier of fact in understanding complex subject matter, *see, e.g., First Tennessee Bank Nat’l Assoc. v. Barreto*, 268 F.3d 319 (6th Cir. 2001) (addressing lender-borrower relationship in banking industry), whereas lay testimony may serve the purposes for which defendants now propose requires expert testimony. *Newport Elec. v.*

Newport Corp., 157 F. Supp. 2d. 202, 208-09 (D. Conn. 2001) (permitting lay opinion testimony from president of company on products sold by company, his understanding of what was sold and what competitor sold and actual confusion that he and his company had experienced). It is thus not apparent how the proposed testimony is beyond the understanding of a jury, thus requiring the use of experts.

Of all cases cited in support of defendants' position that expert testimony should be permitted in the present case, only *Betterbox Communications Ltd. v. BB Techs., Inc.*, 300 F.3d 325, 336 (3d Cir. 2002), arguably supports their position. The expert testimony therein was offered for purposes of establishing "whether there was a likelihood that consumers would be confused by the [plaintiff's] and [defendant's] marks." *Id.* at 327. The expert's credentials involved twenty years of practical experience in catalog marketing and four years of experience in computer marketing. *Id.* The court analyzed the expert's methodology under *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149-50, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), and pointed out that personal experience satisfied the methodology requirement for expert testimony. *Betterbox Communications Ltd.*, 300 F.3d at 329. The majority found no error, concluding "[i]n order to hold that the District Court erred in admitting [the] testimony, [it] would have to conclude that the District Court abused the considerable discretion that it enjoyed to determine the criteria for judging reliability under the particular circumstances present here." *Id.* The case, therefore, is less an imprimatur on the use of experts under the circumstances and more a reflection of the considerable deference afforded a trial court in evidentiary determinations.

Nonetheless, the dissent objected to the majority's refusal to find an abuse of discretion in concluding the expert was qualified to comment on likelihood of confusion between the marks. In so dissenting, he noted that "[a]lthough we have not regarded academic training as a prerequisite for

qualifying an expert witness, in order to qualify as an expert, he or she must possess skill or knowledge greater than the average layman.” *Id.* at 335 (Rosenn, J. dissenting). The dissent thus highlights the very concern this Court now shares, specifically why expert testimony is required or useful to resolve a factual issue “determined by viewing the two marks from the perspective of an ordinary consumer of the goods or services,”³ *id.* at 334, once evidence has been offered as to the characteristics of the ordinary consumer.

The problem lies in what this Court must characterize as an unorthodox approach to resolving issues of whether trade dress is generic or is likely to cause confusion with another’s mark. “[T]here are at least three evidentiary routes to prove a likelihood of confusion [and likely genericness]—survey evidence, evidence of actual confusion, and/or argument based on an inference arising from a judicial comparison of the conflicting marks themselves and the context of their use in the marketplace.”

Heartland Bank v. Heartland Home Finance, Inc., --- F.3d ----, NO. 02-2468, 2003 WL 21664723 (8th Cir. July 17, 2003) (Smith, J., concurring); *see also Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 297 (2d Cir. 1999) (describing standard applicable to use of expert surveys in ascertaining likelihood of confusion); *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997) (“[i]n trademark cases, surveys are to be admitted as long as they are conducted according to accepted principles and are relevant”); *Insty*Bit, Inc. v. Poly-Tech Indus.*, 95 F.3d 663, 671-72 (8th Cir. 1996) (describing use of surveys in ascertaining likelihood of confusion); *Reed-Union Corporation v. Turtle Wax, Inc.*, 77 F.3d 909, 911-2 (7th Cir. 1996) (describing survey conducted by marketing

³ It is not apparent from the decision that the testimony necessarily was specific to the likelihood of confusion analysis. As the expert was skilled in graphic design, and the expert opinion was as to the presentation in catalogs, the subject matter may very well have been sufficiently technical to lend itself to expert testimony.

expert); *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 748 (2d Cir. 1994) (“[t]o be probative, a survey must have been fairly prepared and its results directed to the relevant issues” (internal quotation marks omitted)); 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 12.14 (4th ed. 1999) (“Consumer surveys have become almost *de rigueur* in litigation over genericness.”).

The typical forms of evidence for the issues involved herein have appurtenant safeguards. Survey data may be discredited based on poor demographic selection or poor methodology. Testimony as to actual confusion may be impeached. Graphic presentations may be assailed as not representative. There is a very real problem with presentation of the same evidence through an expert witness, whose data gleaned from personal experience may blur into a general impression over the course of time and thus cannot be dissected through cross-examination, and whose methodology in arriving at opinions may be either not apparent, or worse, nonexistent. Although plaintiffs cite a number of cases in which “industry experts [have been] allowed to testify as to the sophistication of the typical consumer in an industry,” *see, e.g., Scott v. Mengo Int’l*, 519 F. Supp. 1118, 1133-34 (D. Minn. 1981), curiously absent from these cases is the designation of such witnesses as experts, *see id.* at 1133 (“[t]estimony of experienced wargamers and proprietors of stores selling wargame items established that wargamers are sophisticated purchasers who generally know what they want before they enter the stores”).

The foregoing should serve as guidance to defendants on perceived issues in the presentation of the proposed expert testimony. Prudence, however, dictates that a categorical exclusion of all expert testimony absent a specific proffer may preclude testimony that would otherwise assist the trier in

understanding a particular subject. The motion is therefore denied with leave to renew based on a specific proffer.

III. CONCLUSION

Defendant AWA's motion to redesignate purportedly confidential documents (Doc. No .133) is **granted**. Plaintiffs' motion in limine to strike proposed experts (Doc. No. 178) is **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, August ___, 2003.

Peter C. Dorsey
United States District Judge